

Third District Court of Appeal

State of Florida

Opinion filed July 22, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1008
Lower Tribunal No. 13-4086

Fahed Fayad, M.D.,
Appellant,

vs.

**University of Miami d/b/a University of Miami Hospital and d/b/a
University of Miami Hospital & Clinics/Sylvester Comprehensive
Cancer Center, a Florida corporation,**
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Spencer Eig,
Judge.

Agentis, PLLC, and Christopher B. Spuches and Jacqueline Calderin, for
appellant.

Isicoff Ragatz, and Eric D. Isicoff and Teresa Ragatz, for appellee.

Before LOGUE, HENDON, and LOBREE, JJ.

HENDON, J.

Fahed Fayad, M.D. (“Dr. Fayad”) appeals from the trial court’s order denying his Motion for Leave to File First Amended Complaint (“Motion to Amend Complaint”) and from the entry of a final summary judgment in favor of the University of Miami, etc. (“University”). For the reasons that follow, we reverse both the order denying the Motion to Amend Complaint and the final summary judgment.

In 2001, Dr. Fayad began to work at Cedars of Lebanon Hospital’s (“Cedars”) radiation oncology department where he was permitted to obtain privileges without becoming an employee. In 2007, the University purchased Cedars, and Cedars then became University of Miami Hospital (“UM Hospital” or “UMH”). Following the purchase of Cedars, the University’s health system network was comprised of three wholly-owned hospitals—UM Hospital, Sylvester Comprehensive Cancer Center, and Bascom Palmer Eye Institute. After the University purchased Cedars, the University amended UM Hospital’s bylaws to reflect that UM Hospital would allow both faculty member physicians and community non-faculty private practice physicians (“PPP”), such as Dr. Fayad, to continue practicing their specialties at UM Hospital. Further, the Bylaws provide, in part, as follows:

**7. ARTICLE SEVEN: HEARING AND APPELLATE REVIEW
PROCEDURES**

....

7.2 EXCEPTIONS TO HEARING AND APPEAL RIGHTS

7.2.6 HOSPITAL/UNIVERSITY POLICY DECISION

The hearing and appeal rights of these Bylaws are not available if the Hospital or the University makes a policy decision (e.g., closing a department or service, or a physical plant change) that adversely affects the Staff membership and Clinical Privileges of any Staff member or other individual.

In April 2012, the University of Miami Health Systems' Chief Executive Officer, Dr. Pascal Goldschmidt, wrote a letter to the medical doctor who led the delegation for PPPs at UM Hospital, addressing the status of PPPs at UM Hospital. The letter indicated that the following Principles of Medical Practice at UM Hospital will be, and eventually was, incorporated into UM Hospital's Rules and Regulations:

4. No Private Practice Physicians shall overtly or covertly be forced to join a practice group in order to continue practicing their specialty at UMH except as the bylaws may otherwise require. (e.g. exclusive contracts.).
5. All PPP shall be encouraged but are not required to participate in the UM teaching program and become part of the voluntary faculty if they meet the usual faculty requirements. PPP who choose not to participate in the UM teaching program shall not be disadvantaged as a result of their choice.

In mid-January 2015, Dr. Fayad received a letter from UMH's then-Chief Executive Officer, advising Dr. Fayad of the following:

This will confirm that effective February 4, 2013, UMHC/Sylvester Comprehensive Cancer Center will take over full responsibility for the operation of the Radiation Oncology clinic in the West building. . . . It is consistent with our recent implementation of service lines and also

consistent with UHealth's plans to consolidate the oncology service line under UMHC/Sylvester's license, medical staff bylaws, and management. . . .

As a result of this decision, UMH will no longer provide radiation oncology services on an outpatient basis. Accordingly, any physician providing services in the current facility will have to be credentialed and privileged at UMHC and be compliant with policies and procedures of the Department of Radiation Oncology at UMCH/Sylvester. If you request it, UMHC will provide an application for staff privileges and the Department will consider a request for a voluntary faculty appointment in the Department of Radiation Oncology. . . .

. . . .

Please note that decisions related to the continuation, elimination, or modification of a hospital service or service lines are within the authority of the Hospital and the University pursuant to the applicable bylaws.

After receiving the letter, Dr. Fayad did not apply for privileges or for a voluntary appointment as indicated in the letter.

On February 4, 2013, Dr. Fayad filed the underlying action, asserting that the University's actions violated its Bylaws and its Rules and Regulations. In his complaint, Dr. Fayad asserted the following counts: injunctive relief (Count I), declaratory relief (Count II), breach of contract (Counts III and IV), and tortious interference (Count V).

For the next few years, Dr. Fayad conducted over twenty depositions, and the parties engaged in discovery. In September 2018, Dr. Fayad's counsel moved to withdraw. On October 1, 2018, while the motion to withdraw was pending, the

University filed its motion for summary judgment. On October 16, 2018, the trial court granted the motion to withdraw and provided Dr. Fayad with forty-five days to retain counsel, which timeframe was thereafter extended.

On January 29, 2019, Dr. Fayad's newly-retained counsel filed a notice of appearance, and a few days later, Dr. Fayad's counsel received approximately twenty-five bankers boxes of discovery from prior counsel. On February 22, 2019, the trial court entered an agreed order rescheduling the summary judgment hearing from March 19, 2019 to April 18, 2019.

On February 27, 2019, Dr. Fayad's counsel filed the Motion to Amend Complaint to add a fraud count, asserting that, after reviewing Dr. Goldschmidt's deposition testimony, it became apparent that there was a good faith basis for the fraud count. In the proposed fraud count, Dr. Fayad alleged that the University made false statements of material fact and/or fraudulently omitted material facts before Dr. Fayad and other PPPs agreed to the terms of certain Bylaws and the Rules and Regulations. In the Motion to Amend Complaint, Dr. Fayad also asserted that he is not requesting additional discovery in connection with the proposed fraud count; not seeking to continue the summary judgment hearing scheduled for April 18, 2019; not seeking to re-open the pleadings and stipulates that if the motion is granted, Dr. Fayad will not later take the position that the trial order was rendered void by virtue of the amended pleading; and not seeking to continue the trial scheduled for

September 9, 2019. Moreover, Dr. Fayad asserted that he had not abused his privilege to amend as this was his first motion to amend the complaint, the proposed amendments are not futile, and the proposed amendments will not cause undue prejudice.

Following a hearing conducted on March 14, 2019, the trial court entered an order denying Dr. Fayad's Motion to Amend Complaint, which provides as follows:

The Court finds that the prejudice to the Defendant and to the prompt administration of justice outweighs the Plaintiff's interest in amending the Complaint. This matter is six years old and adding fraud causes to a breach of contract action on the eve of summary judgment and trial are not required by justice.

Following a hearing on the motion for summary judgment, the trial court entered final summary judgment in favor of the University. Dr. Fayad's appeal followed, challenging both the denial of his Motion to Amend Complaint and the entry of final summary judgment.

Dr. Fayad contends the trial court abused its discretion by denying his motion for leave to file a first amended complaint. Under the circumstances of this case, we agree.

A trial court's ruling on a motion to amend a complaint "will not be disturbed on appeal in the absence of an abuse of discretion." See Lasar Mfg. Co. v. Bachanov, 436 So. 2d 236, 237 (Fla. 3d DCA 1983); see also Dimick v. Ray, 774 So. 2d 830, 833 (Fla. 4th DCA 2000) (holding that a trial court's ruling on a motion to amend a

complaint is reviewed on appeal for abuse of discretion). Florida Rule of Civil Procedure 1.190(a) provides that leave of court to file an amended pleading “shall be given freely when justice so requires.” A trial court’s denial of a motion to amend a complaint is generally an abuse of discretion unless (1) the privilege to amend has been abused, (2) the amendment would prejudice the opposing party, or (3) the amendment would be futile. See Marquesa at Pembroke Pines Condo. Ass’n v. Powell, 183 So. 3d 1278, 1279-80 (Fla. 4th DCA 2016).

First, it is undisputed that Dr. Fayad has not abused the privilege to amend as he had never amended the original complaint. Second, the amendment would not have prejudiced the University as the information discovered by Dr. Fayad’s newly-retained counsel was known to the University. Although we recognize that “liberality in granting leave to amend diminishes as the case progresses to trial,” Lasar Mfg., 436 So. 2d at 237-38, in the instant case, based on the stipulations set forth by Dr. Fayad’s counsel in the Motion to Amend Complaint, the granting of the motion would not have prejudiced the University or adversely affected the prompt administration of justice. Dr. Fayad agreed that if the trial court granted his Motion to Amend Complaint, he (1) would not request additional discovery in connection with the proposed fraud count, (2) would not seek to continue the summary judgment hearing scheduled for April 18, 2019, (3) would not seek to re-open the pleadings, stipulating that if the motion was granted, Dr. Fayad would not later take the position

that the trial order was rendered void by virtue of the amended pleading, and (4) would not seek to continue the trial scheduled for approximately six months later on September 9, 2019. Thus, based on these stipulations, the hearing on the University's motion for summary judgment on the counts set forth in the original complaint would have gone forward on April 18, 2019, and the trial scheduled for September 9, 2019, would not have been rescheduled. Finally, at this juncture, there is no indication that the amendment would have been futile.

In finding that the trial court abused its discretion by denying Dr. Fayad's Motion to Amend Complaint, we have considered this Court's decision in Vella v. Salaues, 290 So. 3d 946 (Fla. 3d DCA 2019). Vella appealed the denial of his motion for leave to amend the complaint, in which he sought to add a new theory. Id. at 948. Finding no abuse of discretion because the prejudice to the defendants (the Salaueses) was evident, this this Court affirmed the denial of Vella's motion for leave to amend the complaint. Id. at 949.

Factually, the instant case and Vella are distinguishable. First, in Vella, the motion for leave to amend the complaint was filed "on the proverbial 'eve' of the summary judgment hearing"—only two weeks before the scheduled summary judgment hearing. Id. at 949. In contrast, Dr. Fayad did not file his Motion to Amend Complaint on the "eve" of the summary judgment hearing. Rather, he filed his Motion to Amend the Complaint about six weeks before the summary judgment

hearing and six months before the scheduled trial. Second, in the Motion to Amend Complaint, Dr. Fayad, as stated above, provided certain assurances, indicating that the proceedings would not be delayed if the trial court granted the Motion to Amend Complaint. The Vella opinion does not indicate that such assurances were given when Vella moved for leave to amend the complaint, supporting this Court's determination that "the prejudice to the Salaueses is evident." Id. at 949. Such prejudice does not appear here. Accordingly, we reverse the trial court's order denying Dr. Fayad's Motion to Amend Complaint.

Dr. Fayad also contends that the trial court erred by entering final summary judgment in favor of the University where a genuine issue of material fact exists. We agree.

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. Thus, our standard of review is de novo." Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) (internal citation omitted).

At the hearing on the motion for summary judgment, the University argued that its actions were justified because the oncology radiation department at UM Hospital closed, and therefore, its actions were not improper. In contrast, Dr. Fayad argued that the oncology radiation department at UM Hospital actually remained open and the University only changed the name of the department to "Sylvester

West.” As such, under the Bylaws and the Rules and Regulations, the University’s actions were improper. In support of their arguments, both sides have pointed to matters contained in the discovery that could possibly support their respective positions. Thus, as a genuine issue of material fact existed, the trial court erred by entering final summary judgment in favor of the University. Accordingly, we reverse the trial court’s entry of final summary judgment in favor of the University and remand for further proceedings consistent with this opinion.

Reversed and remanded.